

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.991 of 2019

Arising Out of PS. Case No.-330 Year-2016 Thana- BHABHUA District- Kaimur (Bhabua)

Ghurahu Ram Son of Nathuni Ram Resident of Village-Etadhi, P.S-Sonhan (Bhabua), District-Kaimur (Bhabua).

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Ravi Shankar Sahai, Advocate
Mr. Chandra Mohan Jha, Advocate
For the Respondent : Ms Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA
CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 23-11-2022

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) assailing the judgment of conviction dated 08.04.2019 and order of sentence dated 11.04.2019 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Kaimur at Bhabua in POCSO Trial No. 25 of 2016 arising out of Bhabua P.S. Case No. 330 of 2016, whereby the appellant has been convicted and sentenced as under:

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
344 of the Indian Penal Code	S.I. for three years	-	-
323 of the Indian Penal Code	One year imprisonment	-	-



366 of the Indian Penal Code	R.I. for Ten years	10,000/-	-
376D read with 376(2) (n) of the Indian Penal Code read with Section 6 of the POCSO Act	For Life	30,000/-	-

2. We have heard Mr. Ravi Shankar Sahai, learned counsel for the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State.

3. The informant (P.W.-7) is the father of the victim (P.W.-3). Based on the written report of the informant (P.W.-7) dated 20.05.2016 in relation to an occurrence dated 15.05.2016, the First Information Report (F.I.R. for brevity) *i.e.* Bhabhua P.S. Case No. 330 of 2016 was registered disclosing commission of an offence punishable under Section 366A read with Section 34 of the Indian Penal Code (I.P.C. for brevity) against this appellant and three others. The substance of allegation made in the F.I.R. was that on 15.05.2016, the informant's minor daughter, aged about 12 years, who had gone out of the house to ease herself, had not returned. He disclosed his firm belief in his written report that this appellant, his father Nathuni Ram and his brothers Aklu Ram and Akhilesh Ram must have kidnapped her for the purpose of marriage. It emerges from the materials on record that the victim was subsequently recovered with the appellant by the personnel of Samaipur Badli Police Station,



Delhi on 03.07.2016. On receipt of the information regarding recovery of the victim, the police officials of Sonhan Police Station went to Samaipur Badli Police Station in Delhi and brought back the appellant and victim to Sonhan Police Station. Thereafter, she was medically examined on 06.07.2016 apparently to determine incident(s) of sexual assault. Also, she was referred to a Medical Board by the Doctor (P.W.-1) for determination of her age. The Doctor (P.W.-1) opined as under:-

“There is no evidence of recent sexual intercourse.

However, H/o past intercourse cannot be ruled out”

4. Further, based on physical examination, dental status and the radiological examination of the victim, the Medical Board determined the age of the victim to be between 17-18 years. The statement of the victim was recorded under Section 164 of the Code of Criminal Procedure (Cr.P.C. for brevity) on 08.07.2016. In her statement, she disclosed that in the evening at 7:00-7:30 pm, when she was going towards the eastern side of her village to ease herself, the aforesaid four F.I.R. named accused persons had kidnapped her, forced her to sit in a vehicle after gagging and blindfolding her and had taken her to Banaras. At Banaras Railway Station, three (the appellant's father and two others), out of the four returned



whereas the appellant, who was having in his possession a country made pistol, stayed with her. From Banaras, the appellant took her to Delhi by train. She did not notice any police personnel in her train journey to Delhi. In the morning, they arrived in a room in Delhi. There is thereafter narration of physical and sexual assault caused on the victim by this appellant. She disclosed that the appellant would go for his duties after putting her in lock & key from outside, in the said room. Feeling high and dry, she started living with him and in the meanwhile he continued to establish illicit sexual intercourse with her for fifteen days. Thereafter, the appellant brought his friends for immoral trafficking. She further narrated that three of the friends of the appellant also sexually assaulted her. One day, on her (victim's) request, the landlord had called the police, whereafter the appellant and the victim were taken to the police station in Delhi. At the police station in Delhi, the police personnel of Sonhan Police Station from Bihar came with the victim's uncle who brought her back to Bihar and to Sonhan Police Station and subsequently before the Magistrate, for recording of her statement.

5. The police upon completion of investigation, submitted charge-sheet for commission of the offences



punishable under Section 366A, 376, 341, 323/34 of the I.P.C and Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act for brevity). The appellant was subsequently charged for commission of the aforesaid offences by the Trial Court. At the trial, nine witnesses came to be examined including the Doctor as P.W.-1 and two Investigating Officers as P.Ws 8 and 9. Victim's uncles came to be examined as P.W.-2 and P.W.-4. The victim, her mother and father were examined at the trial as P.W.-3, P.W.-6 and P.W.-7 respectively.

6. After examination of the prosecution's witnesses, the Trial Court brought to the notice of the appellant the circumstances emerging against him based on the evidence of the prosecution's witnesses and gave him the opportunity to respond in his defence. The appellant's response was complete denial of those circumstances.

7. The Trial Court, upon analysis of the evidence adduced at the trial has concluded, in its impugned judgment of conviction, that the victim was under 18 years of age, following the finding recorded in the report of Medical Board (Exhibit-2), *i.e.* “she is aged about/in between 17-18 years”. Such being the circumstance, according to the learned Trial Court, presumption of commission of offence as prescribed under Section 29 of the



POCSO Act came into operation. As the defence failed to examine any oral or documentary evidence in support of his case, the charge against the appellant stood fully proved by the evidence of prosecution's witnesses as well as the statement of the victim recorded under Section 164 of the Cr.P.C.. After having held so, the Trial Court convicted the appellant of the offences punishable under Section 344, 366, 323, 376(2)(n) and Section 376D of the I.P.C. and Section 6 of the POCSO Act. The Trial Court acquitted the appellant of the charge for commission of offence punishable under Section 341 of the I.P.C. as he had been found guilty of commission of offence punishable under Section 344 of the I.P.C..

8. Mr. Ravishankar Sahai, learned counsel appearing on behalf of the appellant has submitted that the victim has been wrongly held to be child within the meaning of Section 2(d) of the POCSO Act based on approximate determination of age by the Medical Board. He has further submitted that even if the report of the Medical Board is taken to be correct, the victim has been found to be between 17-18 years and, accordingly, it cannot be conclusively held that the victim was a child, below 18 years as on the date of occurrence so as to attract the provisions under the POCSO Act. He



contends that, therefore, the Trial Court has wrongly invoked Section 29 of the POCSO Act for recording conviction of the appellant, based on statutory presumption under the said provision. He has further submitted that it is evident from the deposition of the victim (P.W.-3) herself that she had disclosed to the Delhi police that the appellant and the victim had married each other at Banaras and they were living together as husband and wife. The evidence of the victim that she had made such statement before the police in Delhi under threat of being killed by the appellant is wholly unreliable. He argues that the prosecution's case as set-out by victim at the trial in her deposition to the effect that she was taken in a train against her will from Banaras to Delhi and without any resistance or complaint made to the co-passengers is highly improbable. He further argues that the victim P.W.-3 does not appear to be trustworthy and, therefore, it will be unsafe for this Court to uphold the appellant's conviction under Section 376D, 376(2)(n) of the I.P.C. based on her sole evidence in the absence of cogent corroborative evidence adduced at the trial. He has submitted that there are material contradictions in the evidence of other witnesses also who are closely related with the victim and charge against the appellant of unconsented sexual assault



stands demolished.

9. Learned Additional Public Prosecutor representing the State has argued on the other hand that the Trial Court has rightly held the victim to be a child based on the Medical Report of the Medical Board constituted for the purpose of determination of the victim's age. She has further submitted that the victim has vividly narrated the manner in which she was subjected to sexual assault in Delhi by the appellant, and at his instance, by his other friends. She contends that minor contradictions in the evidence of the prosecution's witnesses are immaterial for this Court to interfere, exercising the appellate jurisdiction as the Trial Court has recorded conviction after due scrutiny and analysis of the evidence adduced at the trial which had the added advantage of witnessing the demeanor of the witnesses during the course of trial.

10. We have perused the impugned judgment and the lower court's records. We have keenly scrutinized the evidence of the prosecution's witnesses and other evidences adduced at the trial by the prosecution. Further, we have given our thoughtful considerations to the rival submissions made on behalf of the appellant and the State.



11. At the outset, we are of the opinion that there is substance in the submission made on behalf of the appellant that the prosecution has failed to establish beyond all reasonable doubt that the victim was a child as on the date of occurrence which is a condition precedent for attracting the provisions of the POCSO Act. The Medical Board had given an approximate age of the victim to be 17-18 years. The said report cannot be said to be suggesting that the victim was definitely under 18 years of age as on the date of examination by the Medical Board. In the Court's opinion, unless the prosecution is able to establish with cogent evidence that a victim of sexual assault is a child within the meaning of Section 2(d) of the POCSO Act, the provisions of the POCSO Act cannot be applied. The age determination, based on radiological examination of the victim cannot be said to be an accurate determination of age. In any view of the matter, there is no evidence other than the report of the Medical Board on the point of determination of the age of the victim. The prosecution did not make any effort to bring by way of evidence, any school admission register or other documentary evidence to establish that the victim was a minor. At this juncture, we consider it useful to notice the Supreme Court's observations in the case of ***Rajak Mohammad v. State***



of H.P. reported in **(2018) 9 SCC 248**, paragraph 9 and 10 of which read as under:-

“9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.”

12. As a natural sequitur of this Court's conclusion that the prosecution failed to establish that the victim was a minor as on the date of the occurrence, the conviction recorded by the Trial Court of the offence punishable under Section 6 of the POCSO Act cannot be sustained. Further, Section 29 of the POCSO Act cannot be made applicable for the same reason.

13. The aforementioned conclusion takes us to scrutinize the evidence of the witnesses to ascertain the



sustainability of the appellant's conviction for the offences punishable under Section 376D, 376(2)(n), 366 and Section 344 of the I.P.C.. For the said purpose, before referring to the deposition of the prosecution's witnesses we need to address an issue of seminal significance, *i.e.*, as to whether the victim can be said to be trustworthy and sterling witness of whose version is capable of being accepted for its value, and based on whose sole testimony the conviction recorded by the Trial Court can be upheld.

14. It is noticeable for the said purpose, that the victim, during her cross-examination had deposed in paragraph 20 that on the date of occurrence, only her grandmother was there with her in the house as her mother and sister had gone to Patna. Her father was in Patna for last 15-20 days. Her father (P.W.-7) in his evidence deposed that on the other hand that at the time of occurrence, he was sitting at the door of his house when the victim had left the house to ease herself. Similarly, the mother of the victim (P.W.-6) too deposed that she was cooking in her house when the victim had left the house to ease herself, whereafter they had started searching for the victim. The presence of the family members including the parents of the victim in the house when she had left to ease herself whereafter,



according to the victim, was kidnapped by the persons named in the F.I.R. is a fact which in normal circumstances cannot be forgotten even with the lapse of time. The contradictions on this point, in the evidence of crucial witnesses *i.e.* the victim (P.W.-3), her mother, (P.W.-6) and her father (P.W.-7) are of significance and cannot be lost sight of. Further, she travelled from Banaras to Delhi, according to her deposition, in a train. Her testimony that she could not raise any alarm while waiting for the train at the railway station or while traveling from Banaras to Delhi in the train under threat of being killed by the appellant, does not inspire much confidence. There is no evidence that she had put any resistance while moving from the railway station in Delhi to the room where she was kept. On close scrutiny of the evidence of the victim read with evidence of her parents, we are of the view that the victim (P.W.-3) cannot be said to be wholly trust worthy based on whose sole testimony the conviction of the appellant can be upheld.

15. A question, however, arises as to whether it can be deduced based on evidence of the witnesses adduced at the trial by the prosecution that the prosecution was able to establish beyond all reasonable doubts, commission of offences by the appellant punishable under Sections 376D, 372(2)(n), 344, 366



and 323 of the I.P.C..

16. Before we address this aspect, we have reminded ourselves the fact that the appellant, his father and two brothers were named in the F.I.R., based on a suspicion raised by the informant in his written report that they might have induced her and taken her away for her marriage to this appellant. Written report was filed five days after P.W.-3 had left her house in the evening. The basis or the reason why the name of this appellant and his family members were mentioned in the written report disclosing the purpose of the alleged kidnapping of the victim was not disclosed in the written report. The informant believed that the accused persons had kidnapped/abducted the victim for marriage. Though it may not be definitely concluded, it is easy to infer that the informant knew that the disappearance of the victim was in the background of likely marriage of the victim to the appellant.

17. We have noticed the expert's opinion of the Doctor recorded upon examination of the victim, which does not suggest commission of rape, though the chance events of sexual intercourse has not been ruled out. Further, there is complete absence of any investigation of the places of occurrences in Delhi where the victim claims to have been raped not only by



the appellant but his friends too. It is her own deposition that she had disclosed to the police personnel in Delhi after having been recovered with the appellant by the police in connection with this case that they had married each other and were living in the room as husband and wife. She deposed at the Trial that she was finding out some way to escape from the room in which she was locked. One day she noticed a brick placed in a hole in the room which she was attempting to remove. When the landlord of the house heard the sound, he removed the brick from outside to whom she explained everything. Thereafter the landlord informed the police. The police came in the evening when the appellant was sleeping in the room. The landlord of the house in which the appellant and the victim were residing when they were recovered has not been examined. The victim stayed in Delhi for nearly two months. First 10 to 15 days they stayed at one place whereafter they had moved to another place. There is no investigation on the point as to which were the two places/houses where the appellant and the victim lived together, in Delhi. The victim neither disclosed nor investigation appears to have been conducted in Delhi on the point of the said two places and their landlords and other neighboring residents. She also deposed that she was not allowed to bathe. She deposed



that the second house where they lived was far away from the first house to which they had moved on foot in the evening. She had lived for 10 to 15 days in the first room and she was provided food by the appellant only on one day. In the second room she was given food for five days after she was shifted. Further, after ten days and third time, after 15 to 20 days. She also deposed that she was physically assaulted by the appellant regularly. The Doctor, during the medical examination found some signs of injuries on her back less than seven days old. It is noted that the victim and the appellant were recovered by the Delhi police on 03.07.2016 and the victim was put to medical examination on 06.07.2016. The medical report does not conclusively corroborate the victim's evidence that the appellant used to regularly beat her up when she was made to stay with him. It is her own evidence that she traveled on foot from the first house to the second house with the appellant which was far away from the first house. There is no evidence that she had raised any alarm or put any resistance.

18. Further, in her cross-examination, the victim (P.W.-3) deposed that when her eyes were unfolded by the miscreants, it was 12:00-12:30 pm. The four wheeler was stopped at some distance from the railway station. The appellant



had fetched the victim water after the victim was taken to the railway station. They (appellant and the victim) had walked to the railway station after alighting from the car. They had crossed two to three railway lines before they had reached the platform where other passengers were sitting. They sat on a bench on the platform for half an hour whereafter the train arrived. She admitted that there were persons sitting in the train on the seats whereas she was sitting on the floor. In her deposition in paragraph 27, she stated that the appellant had slept beside her in the train. Further, no Train Ticket Examiner had come to ask for ticket from the appellant. The appellant had purchased one suit and a pair of pyjamas for her after they had reached Delhi. She, in paragraph 31 of her deposition stated that she had declined the request of the Delhi police to be medically examined. She also deposed that she had told the Doctor to whom she was taken by the Delhi police that they had lived in Banaras for a month after marrying each other. She however, further deposed that she had said the fact to the Doctor as it was directed by the appellant. She further deposed that in the police station in Delhi, the appellant and the victim were kept together for whole day and in the night they were made to stay separately.



19. The evidence of the victim's father (P.W.-7) and the victim's mother P.W.-6 is only to the effect that the victim had gone out to ease herself whereafter she had not returned and after her search for five days, the F.I.R. was registered. Their evidence that they were present in the house when the victim had left the house is contradicted by the evidence of the victim herself, who has in no uncertain terms deposed that her father had gone for treatment to Patna nearly 15 to 20 days before the date when she was kidnapped and her mother was also not there in the house on the said date. She deposed that her grandmother was the only person present in the house on 15.05.2016, on which day she was said to have kidnapped by this appellant, his father and his two brothers. Be it noted that it is evident from the F.I.R. itself that the victim and this appellant are co-villagers.

20. The testimonies of P.Ws-4 and 5 do not throw any light on the accusation of sexual assault made by the appellant on the victim. They simply deposed that they had learnt from the informant that the victim was kidnapped. They are also witness to the fact that the victim was recovered with the appellant subsequently in Delhi as mentioned hereinabove. To address the question as to whether the prosecution can be



said to have proved commission of offence by the appellant under Section 376D of the I.P.C., we need to refer to the said provision which read as under:-

“376D-Gang Rape

Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.”

21. As we have noticed hereinabove, though P.W.-3 in her deposition has stated that three persons other than the appellant had sexually assaulted her in Delhi, there is absolutely no evidence as to who were those persons and where the said occurrences had taken place. In our opinion, the finding recorded by the Trial Court of conviction under Section 376D of the I.P.C. is wholly unsustainable and is bereft of any evidence essential to constitute an offence punishable under Section 376D



of the I.P.C.. Based on the evidence emerging from the deposition of P.W.-3, it rather appears that there was no absence of willingness of P.W.-3 in her going to Delhi with the appellant. Had that been so, P.W.-3 had ample opportunity to raise alarm or put resistance as she was on several occasions at public places like Railway Station, Train, Road etc.. She was moving with the appellant on foot in order to reach railway platform to catch a train. In the train, the appellant himself had slept. There were co-passengers in the train. The victim did not chose to tell anyone that she was being kidnapped by the appellant, his father and two brothers or that she was being forcibly taken by the appellant against her will. The evidence of P.W.-3 of commission of rape by the appellant after having been kidnapped loses its credibility after appreciating the cumulative effect of the evidence of the victim, and her statement made before the police and doctor in Delhi that the appellant and the victim had married each other. We are not inclined to enter into the circumstances in which P.W.-3 came to depose against the appellant accusing commission of rape by him after her kidnapping by the appellant's father and brothers. Be that as it may, the case of the prosecution of commission of offences by the appellant punishable under Section 376D of the I.P.C.



becomes doubtful.

22. As regards commission of offence punishable under Section 376(2)(n), commission of rape by a person repeatedly on the same women is punishable under the said provision. We are of the view that the prosecution has not been able to establish beyond all reasonable doubt, considering all the circumstances emerging from the evidence of the victim herself that sexual intercourse, if any, between the appellant and P.W.-3 was against her will or without her consent. Apparently, learned Trial Court has convicted the appellant of the offence punishable under Section 376(2)(n) of the I.P.C. after having held the victim/P.W.-3 to be a minor, which finding, in our opinion, is unsustainable. The said finding cannot be said to be beyond reasonable doubt and therefore cannot be upheld. Consequently, the appellant's conviction under Section 376(2)(n) of the I.P.C. cannot be upheld.

23. In our opinion, the prosecution's case as set out at the trial, right from the stage of the alleged kidnapping of the victim by the appellant, his father and two brothers becomes highly suspicious and doubtful. In the given circumstance, this Court does not find it safe to affirm the appellant's conviction for the charge of commission of the offences punishable under



Sections 344, 366 and 323 of the I.P.C. also.

24. For the reasons noted above, the finding of conviction recorded by the Trial Court, in our opinion, is unsustainable. The appellant stands acquitted of the charges punishable under Sections 344, 323, 366 of the I.P.C. and Section 376D read with 376(2)(n) of the I.P.C. read with Section 6 of the POCSO Act.

25. The judgment of conviction dated 08.04.2019 and order of sentence dated 11.04.2019 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Kaimur at Bhabua in POCSO Trial No. 25 of 2016 arising out of Bhabua P.S. Case No. 330 of 2016, are hereby set aside.

26. The appellant is in custody. Let him be released forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(I agree)
Khatim Reza, J:

(Khatim Reza, J)

K.K.RAO/-

AFR/NAFR	NAFR
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